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SAINT LOUIS, FEBRUARY 1, 1878.

CURRENT TOPICS.

AMONG the objections which are being urged against the examination of prisoners in criminal trials by those who are opposed to the change in the English law on this subject, is this, that although the conviction of guilty men might and possibly would be facilitated and, in some cases, the change would be to the advantage of the innocent, yet the general tendency of the change would be to increase the chances of conviction of innocent men. The prejudice, it is argued, which, in certain cases exists in the minds of the jury, and even of the judge, would be increased if the prisoner should be forced to tell everything. Charged, for instance, with the crime of rape, though innocent of the crime. it might be necessary for him to confess the guilt of immorality. Then there is the difficulty that a prisoner, especially if he be ignorant, may find it impossible to deal with the facts of a complex case. To think under fire, is the mark of the highest type of a soldier; and the bar of a court room is certainly not the place nor the position of an accused person the situation in which a tale could be told calmly and without contradiction. Those who have watched the proceedings in the lower criminal courts remark the frequent occurrence of cases in which there would be no chance of convicting but for the prisoner's contradictory statements, and that such convictions are always proper is not maintained. There is one point, however, which the English lawyers who are discussing this question at present have quite overlooked, viz., the protection which is thrown around the prisoner under our American statutes on this subject in making his testimony optional with himself and permitting no presumption to be raised against him for not taking advantage of his right. If the facts of his case are either so complex or so unfavorable that his explanation would weigh but little with the jury, or might possibly prejudice them, he may keep silent; if his simple story would clear him from all suspicion, he is at liberty to tell it.

IN *Toncray v. Toncray*, 1 L. R. 283, recently decided by the Supreme Court of Tennessee, where a brother voluntarily undertook the maintenance of his sister, who had abandoned her father's house without his fault, it was held that no action would lie against the father for necessaries furnished by the brother to the sister. The parent is bound, by positive law, to protect, to educate, if able to do so, and to maintain his child during its minority, or until its voluntary abandonment of the parent's protection. But the duties of this relation are mutual and reciprocal. The parent is bound to provide for the child; but he is, on his part, entitled to the obedience, to the custody, and to the services of the child. If the authority of the parent is abjured by the child without any necessity occasioned by the parent, all legal obligation to provide for the child is at an end; and, in such a case, the parent can not be made liable for even necessaries furnished his child by a volunteer, except by his consent—Tyler's Inf. 101; Par. Cont. 254; Chitty Cont. 119; 2 Story Eq. Jur. 1399; Gordon v. Potter, 17 Verm., 350; Raymond v. Loyl, 10 Barbour, 483. In point of law, said Lord Abinger, a father who gives no authority and enters into no contract, is no more liable for goods supplied to his son, than a brother, or uncle, or a mere stranger would be. Mortimore v. Wright, 6 M. & Y.; Schoul Dom. Rel. 328, *et seq.* The English cases, says Mr. Story, seem to establish the proposition that the father can not be made liable for necessaries furnished his child by volunteers, except by his own consent, expressed or implied. 2 Story Eq. Jur. 1349, In the case of Gordon v. Potter, 17 Verm. 348, Redfield. J., states, the doctrine thus: "It is obvious that the law makes no provisions for strangers to furnish children with necessaries against the will of the parents, even in extreme cases; for if it can be done in extreme cases, it can be done in every case where the necessity exists, and the right of the parent to control his own child will depend on his furnishing necessaries suitable to the varying tastes of the time. There is no stopping place short of this if any interference is allowed." And it was held in Raymond v. Loyl, 10 Barb. 483, that a third person, who supplies an infant with necessaries, can not maintain an action against the parent therefor, unless the latter has expressly or impliedly contracted to pay the amount.

THE judgment of the Supreme Court of Pennsylvania, on the appeal of the governor and state officers from the attachments issued against them for refusing to appear before the grand jury at Pittsburg, to be examined in reference to the riots of last summer, is reported in full in the Pittsburg Legal Journal of the 23d inst. The attachments were set aside, a majority of the court holding that the governor, by virtue of his prerogative as commander-in-chief of the army and navy of the Commonwealth, is not answerable to the courts for the manner in which he discharges the discretionary duties confided to him, and that his subordinates or agents are not answerable to any one but himself. The Chief Justice dissents in a lengthy opinion, which is also reported in full in the same journal of the 16th inst. The precedents on this point appear to be few. In Thompson v. German Valley R. R., 22 N. J. (Eq.) 111, a subpœna *duces tecum* had been served on the governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the Court of Chancery, and bring with him an engrossed copy of a private statute, which had been passed by the legislature, and had been sent to him, as governor, for his approval. He refused to obey the subpœna, informing the court at the same time that he did not refuse out of any disrespect to the court or to the law, but because he thought his duty required him not to appear or produce the paper required, or submit his official acts, as governor, to the scrutiny of any court. After argument, Habriskie, Chancellor, said: "The governor can not be examined as to his reasons for not signing the bill, nor as to his action in any respect regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him; that is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty in protecting the rights and dignity of his office, he will not comply, even if directed by an order. And in his case, the court would hardly entertain proceedings to compel him, by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty." Almost the same proceedings were had, and with the same result, in Gray v. Pentland, 2 S. & R., 23, and Beatson v. Skene, 5 H. & N., 838. In the celebrated trial of Aaron Burr, at the request of the defense a supœna *duces tecum* was awarded and directed to the President, requiring him to appear and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or produce the paper required. Chief Justice Marshall said: (Trial of Aaron Burr, Vol. 2, p. 536, Hopkins & Earle, Philadelphia), "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. * * In this case however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he himself is the judge."

IN THE United States Circuit Court, here, during the present term, in the case of *Singer Manufacturing Company v. Saliers* (law), an important question in practice, viz., the right to have witness fees taxed where the evidence of the parties had been previously taken by depositions, was ruled upon by Dillon, J., as follows: The defendants took the depositions of certain witnesses who resided more than one hundred miles from the place of trial. Subsequently, on the trial, these same witnesses were produced by the defendant in court to testify, and did testify. The statutes of the United States provide, that if a witness resides more than one hundred miles from the place of trial, this is ground for taking his deposition and receiving the deposition when so taken. In this case, the witnesses lived more than one hundred miles from St. Louis, and, therefore, it was a proper case for depositions, and the depositions when taken could have been read. This would not preclude the party from actually summoning the same witnesses and having them here. It is often of the greatest importance to have a

witness actually present in court. On the other hand, such is the large territorial extent of the Circuit Courts of the United States—extending in this district three hundred miles or more — that to say a party may absolutely summon all the witnesses he pleases, and if successful tax the entire mileage against the other party, would often work injustice. The true practice is, that in order to prevent hardships and oppression, the clerk will not tax attendance, where witnesses actually appear, for more than one hundred miles, unless upon an order of court. The court having heard the case, knowing the issues and observing the course of the trial, is able to determine whether it is reasonable and proper to allow such fees. It depends very much whether they were called for the purpose of establishing facts which could be well proved by written documents, or to establish a point in the case which could just as well have been established by depositions. If such is the fact, there is no good reason for allowing any mileage beyond the one hundred miles. In this case the issue was one as to the genuineness of a signature. Under these circumstances, as the witnesses properly attended, and as there were no more of them than necessary, the actual mileage and per diem is allowed. But allowing this, the fees for taking dispositions not used are rejected. The practice that has prevailed in the Federal Court here for more than twenty years, according to Treat, J., is: That when a witness is brought into court from a greater distance than one hundred miles, there will be taxed against the adverse party, if defeated, mileage for only one hundred miles, unless from the exceptional character of the case, the court awards mileage for a greater distance. The successful party, producing the witness, must pay the costs of extra mileage when not otherwise ordered by the court, to be taxed against him. When a witness is produced on the stand by a party taking his deposition, no fees for taking the deposition should be allowed.

In the same case, a question was raised as to the right to tax witness fees where the subpœna had not been served by the marshal. Dillon, J., said: The practice in this court is, that as a subpœna is merely directed to the witness instead of the marshal, it can be served by any person; the service to be verified by affidavit. That is a reasonable practice, and, if there is any doubt about it arising under the provision of the statute requiring that all process directed to the marshal shall be served by the marshal, I am not desirous of changing it. But I can not see that any hardship or evil can arise from sustaining the practice of allowing a subpœna to be served by anybody; such service to be properly authenticated.

EFFECT OF FRAUDULENT CONVEYANCES UPON THE RIGHT OF HOMESTEAD.

In a former issue we cited some cases showing the effect of fraudulent conveyances upon the right of dower. Do the same principles apply also to the right of homestead? Most of the cases answer this question, in the affirmative, and hold that a conveyance set aside for fraud at the suit of the husband's creditors, does not estop the grantor, or his wife, from claiming homestead in the premises thus conveyed.[1]

Two general reasons for this rule may be deduced from the cases: 1. That the homestead privilege is created for the benefit of the wife and children, as well as for that of the husband and father; and, therefore, it is not right that the former should be prejudiced by the wrongful act of the latter.[2]

2. That the conveyance being void as to creditors, it stands as to them as though it had never been made; if it had not been made, the debtor, or his wife, could have asserted the right of homestead in the premises against them; and they can not assume the inconsistent positions of asserting the nullity of the

(1) Cox v. Wilder, 2 Dillon C.C. 45; s. c., 7 N. B. R. 241; Smith v. Kehr, 2 Dillon C.C. 50, 63; Danforth v. Beattie, 43 Vt. 138; Kuevan v. Specker, 11 Bush. 1; Crummen v. Bennett, 68 N. C. 494; Sears v. Hanks, 14 Ohio St. 298; Pennington v. Seal, 49 Miss. 518, 527; Edmonson v. Meacham, 50 Miss. 34; Castle v. Palmer, 6 Allen, 401; McFarland v. Goodman, 6 Bissell, 111; Smith v. Rumsey, 33 Mich. 183, 191 (overruling *dictum* in Herschfeldt v. George, 6 Mich. 456); Dreutzler v. Bell, 11 Wis. 114; Murphy v. Crouch, 24 Wis. 365; Pike v. Miles, 23 Wis. 164; Vogler v. Montgomery, 54 Mo. 577; s. c., 1 Central Law Journal, 65. *Contra:* Piper v. Johnston, 12 Minn. 60; Getzler v. Saroni, 18 Ill. 511; Chambers v. Sallie, 29 Ark. 407; Huey's Appeal, 29 Penn. St. 219; McClurg v. Johnson, Sup. Court Tenn., Nash. Com. & Leg. Rep., Oct. 11, 1876; s. c., 2 Law & Eq. Rep. 78.

(2) "He can not maintain it to be both good and bad. The law allows no such paradox." McFarland v. Goodman, 6 Bissell, 117, Hopkins, J.

conveyance and claiming a right under it.[3] In other words, a fraudulent conveyance does not enlarge the rights of creditors, but leaves them to enforce the rights they would have had if no such conveyance had been made.[4] Expressed in still another way, the interest which the creditor has in the property by virtue of his lien is *a derivative interest*, proceeding from the debtor and dependent upon his title. Hence the creditor can not acquire a right under the debtor's title, and at the same time impeach that title. He can not sell, under his execution, the debtor's title, and at the same time deny the debtor's rights of homestead on the ground that the latter has no title.[5]

(3) Cox v. Wilder, 3 Dillon C.C. 49. In this case Dillon, J., said: "Since the exemption is allowed only to the head of a family, it is obvious that the provision is not made solely on account of the husband, but has in view also the wife and children—the *family*. * * * The assignee does not and can not claim under the deed, but in hostility to it; and when it is avoided, and the title placed in the assignee, I do not think (in view of the purpose of the exemption) that the husband is estopped, as against the assignee, to claim the right to the homestead, or the value, to the extent given by the statute. This view does not make the estate any less than if the fraudulent conveyance had not been made, while the opposite view gives the creditors a profit out of the attempted fraud, at the expense of the family, for whose benefit the exemption is mainly, if not wholly, provided. If the law gave to a single man the right to this exemption, it would accord with the natural desire to punish fraud, to visit a penalty upon him; but to denounce a forfeiture of the homestead, where there is a family, subverts the policy on which the exemption is provided and allowed." The same view was taken in an ably reasoned case in the U. S. Circuit Court for the Eastern District of Wisconsin, in which the opinion was delivered by the late District Judge Hopkins. McFarland v. Goodman, 6 Bissell, 111. That able judge held that, although a conveyance of the homestead, executed by a bankrupt to his wife, has been set aside at the suit of the assignee in bankruptcy, the homestead rights remain, and the assignee holds subject to them. The Supreme Court of Missouri, in Vogler v. Montgomery, 54 Mo. 577, have followed and approved Cox v. Wilder. In that case it appeared that the debtor had, prior to the levy, conveyed his title to the premises to a third person, and upon this ground it was claimed that he had forfeited the protection of the homestead law. "If this conveyance was in good faith," said Napton, J., "and valid, then it is obvious that an execution and a sale under it would convey nothing; but if it was fraudulent, * * * then the title was in Vogler, and the homestead law exempted it from execution."

(4) Cox. v. Wilder, 1 Dillon C. C. 49; Kuevan v. Specker, 11 Bush (Ky.) 3; Crummen v. Bennett, 68 N. C. 494; McFarland v. Goodman, 6 Bissell, 111. "These appellees," said Pryor, J., in the Kentucky case, "are asking now to subject the property to the payment of their debts, upon the ground that the conveyance to the son was fraudulent and void as to creditors; and if made liable by the chancellor, it must be for the reason that it is still the property of Theodore Kuevan, the debtor. If his property (himself and his wife being still in possession), the creditors will not be allowed to say that we can subject it to satisfy our demands because he is still the owner, and at the same time deny his right to a homestead for the reason that he is not the owner. If the property is made liable for Theodore Kuevan's debts for the reason that the conveyance is fraudulent and void, it must be sold subject to the exemptions made by law for the benefit of the debtor. The appellees lose nothing by the recognition of this claim to the homestead. If no conveyance had been made they could only have made the property liable in the same way. A fraudulent conveyance does not enlarge the rights of creditors, but only leaves them to enforce such rights as if no conveyance had been made."

(5) Sears v. Hanks, 14 Ohio St. 298, opinion by Scott, J. The judgment in this case is so well reasoned, and has been so often appealed to in support of the rule, that we feel justified in quoting from it at length: "On behalf of the plaintiffs, it is claimed that Hanks and wife are not entitled to the benefits of the statute exempting homesteads, because of their prior conveyance of the premises to their children, whereby they divested themselves of all interest in the property conveyed. And that, as this conveyance is valid as between the parties, and only void as against creditors, to allow the homestead claim, in this case, would be to permit one person to claim a homestead in the property of others. We do not perceive the force of this argument, as coming from these plaintiffs. If it be sound, Hanks, the debtor, has a very narrow standing in court upon the question of ownership. For, it is clear that, as against these plaintiffs, the decree of the court having declared his conveyance to his children fraudulent and void, he is no longer permitted to question the right of his creditors to proceed against the property as *his*, and to sell it for the satisfaction of their claims against him; and, at the same time, that as his conveyance is valid as between grantors and grantees, he is estopped from claiming as against these same plaintiffs, who are asserting the rights of creditors, that he has any interest whatever in the property. And yet, though estoppels are mutual, the plaintiffs claim a right, notwithstanding the conveyance, to regard the property as still belonging to their debtor, and, at the same time, disregarding the decree which they have asked and obtained, to insist that their debtor has no interest whatever in the premises. The debtor is estopped equally from claiming and from disclaiming, while the creditor may do either, and each in turn, as his interest may dictate. Such a position can hardly be maintained. The rights of the plaintiffs in this action are only those which belong to creditors seeking to set aside a voluntary conveyance of their debtor, made in fraud of their rights, and to enforce their judgment liens against the property so conveyed. Their claim is not under or through the fraudulent conveyance, but adverse to it; and when, at their suit, it has been set aside, and declared wholly void as against them, they can not be allowed, as creditors, to set up this void conveyance, against which they are claiming, for the purpose of enlarging their rights or remedies against their debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. As between creditor and debtor, the deed is simply void, and can not therefore affect the rights of either. A judgment creditor's lien is only upon the property of his debtor; and the purchaser at sale on execution takes, in general, only the debtor's title. If the debtor has no title or interest in the property levied on, there is nothing for the creditor to sell; and it is not competent for the creditor, while selling the alleged title of his debtor, to deny his right to a homestead, on the ground that he has no interest in the property about to be sold. If he has an interest in the

If the premises are actually occupied by the debtor as a homestead, it can make no difference, so far as the creditor is concerned, by what sort of title the debtor occupies. By attempting the sale the creditor affirms that the debtor has a saleable interest; and the law means that that interest should not be taken away, and the debtor disturbed in his possession by sale under judicial process.[6]

If a conveyance of land is procured by an insolvent debtor to his wife and children, it will be treated in equity as having been made to himself; and if, with his family he occupies it as a homestead, it will be protected as such; since a title which, if the property were not homestead, could be subjected by creditors, is sufficient to support the homestead right.[7]

Besides, the fraud does not consist in conveying the homestead; for the creditor could not have reached that with his execution had the debtor retained it. The fraud consists in conveying the other part of the land, that the creditor can reach by his execution. But as to the homestead he has no concern. That matter rests between the fraudulent grantor and his grantee.[8]

This appears to be the most satisfactory ground upon which the rule has been placed. It resolves itself into this: that as to exempt property there are, within the meaning of the statute of frauds, *no creditors*.[9] Statutes creating exemptions were not designed to imprison the debtor in his homestead,[10] nor to fetter the transfer of chattels.[11] There being then, no legal restraint upon the debtor against conveying or selling such property, except in those states where the wife is required to join in the conveyance of the homestead, the motives with which such transfers are made are of no concern whatever to the creditor. If he procures a conveyance to be set aside as fraudulent, he takes what is vendible under his execution; the title to the rest is a question to be disputed between the debtor and his grantee. "Since creditors could enforce no process against it, could no more pursue it for their debts against him (the grantor) than they could pursue for the same purpose the absolute property of the Government, the law will not allow it to be said that the transfer of it, if any were made, operated to defraud creditors. When the law declares that a debtor's disposal of his property with intent to defraud his creditors shall be voidable at the instance of his creditors, and at the same time declares that specific property of the debtor shall be exempt as against his creditors' adverse claims, the provisions are *in pari materia*, and must be construed together, and the latter provision must be held to except this exempt property from the operation of the former provision. Certainly it would be very inconsistent to say that a debtor's disposal of property, and which property, in so far as the creditor and his claims are concerned, may be said to have no existance at all, is a fraud upon the creditor. * * * The law excludes the homestead from all remedies of creditors in all courts, and the power of the creditor to take it against the will of the owner is absolutely subverted. There is no question left as to whether there is or should be a remedy somewhere to subject the homestead. The law has closed the door against all discussion about it."[12]

"No creditor *can be*, in legal contemplation, defrauded by a mere conveyance, made by his debtor, of any of his property, which such creditor has no right by law to appropriate, or even to touch, by any civil process. This principle is perfectly plain."[13] "A conveyance of homestead, by the husband to the wife, can not be held fraudulent as to creditors, for the

homestead property, which the creditor can sell, he has interest enough to secure his homestead from sale. The validity of the fraudulent conveyance, as between the parties to it, is no concern of the creditors, when it has been set aside as to him. All he can ask is, that, as against him, it shall confer no rights upon anyone. Were these plaintiffs judgment creditors of the fraudulent grantees, and levying their execution as such, the case would be entirely different; and it might then well be said in response to the present claim of Hanks, that one person can not have a homestead in the property of another."

(6) Pennington v. Seal, 49 Miss., 527. Opinion by Simrall, J.

(7) Edmonson v. Meacham, 50 Miss., 40, in substance. Opinion by Simrall, J. Dreutzler v. Bell, 11 Wis., 114.

(8) Crummen v. Bennett. 68 N. C. 498; Smith v. Rumsey, 33 Mich. 191; Dreutzler v. Bell, 11 Wis. 118; Pike v. Miles, 23 Mo. 168; Legro v. Lord, 10 Maine, 165.

(9) Smith v. Allen, 39 Miss. 469, 475; Duvall v. Rollins, 71 N. C. 221; Smith v. Rumsey, 33 Mich. 191.

(10) Morris v. Ward, 5 Kan. 247.

(11) Shaw v. Davis, 55 Barb. 389; Schlitz v. Schatz, 2 Bissell, 248; Paxton v. Freeman, 6. J. J. Marshall, 234. So declared by statute, in Alabama, repealing a statute declaring otherwise. Cook v. Baine, 37 Ala. 350; Vaughan v. Thompson, 17 Ill. 78.

(12) Smith v. Rumsey, 33 Mich. 191, 192, Graves, J.

(13) Legro v. Lord, 10 Maine, 165, Mellen, C. J.

reason that, being exempt, it was no more beyond their reach than before."[14]

Application of the foregoing principles will readily suggest themselves; but it may be useful to refer to the facts of one or two cases.

Where a husband made a voluntary conveyance of property, including the homestead, to the wife, and afterwards abandoned her, fled the country, and was adjudged a bankrupt, the conveyance was held void as to creditors, but good as between the parties to it, and therefore effectual to convey the husband's right of homestead to the wife; and, the wife remaining in actual occupancy of the premises, was entitled, as against the assignee in bankruptcy, to have the homestead exemption set apart to her. "To that extent," said Dillon, J., "the court could, if necessary, give efficacy to the deed of trust in her favor. If it be necessary that the exemption be applied for in the name of the husband, the court would even allow her to apply in his name, so as to prevent the amount from going into the hands of the assignee, who has no claim or equity whatever to it.[15]"

Under a statute providing that no conveyance of the homestead "is valid in law, unless the wife shall join in such conveyance,"[16] it has been held that a conveyance of the homestead by the husband to a third person, and by such third person to the wife, was valid as against the husband's creditors; since the conveyance being by the husband alone, it had no effect upon homestead estate. Such a conveyance would not estop the husband from afterwards asserting the right of homestead, and certainly not the wife.[17]

(14) Pike v. Miles, 23 Wis. 168, Paine, J., Dreutzler v. Bell, 11 Wis. 118, Cole, J.

(15) Smith v. Kehr, 2 Dillon C.C. 50, 63—opinion by Dillon, Circuit J. affirming Treat, District J.

(16) Mass. Stat. 1857, ch. 298, § 6.

17) Castle v. Palmer, 6 Allen, 401. Compare Mallory v. Horan, 12 Abbott Pr. (N. S.) 289, where a similar question arose as to dower.

(To be continued.)

WE are pleased to note that the committee appointed to examine candidates for admission to the bar are insisting on a high standard, and do not hesitate to reject those who are unable to attain it. Out of eight students examined last Saturday, only two were granted certificates. If this is adhered to, admission to the bar of St. Louis will yet mean something.

NUISANCE—FAILURE OF A RAILROAD TO GIVE SIGNALS AT CROSSINGS.

L. & N. R. R. CO. v. COMMONWEALTH.

Court of Appeals of Kentucky.

[To appear in 13th Bush.]

HON, WM. LINDSAY, Chief Justice.
" W. S. PRYOR, } Associate Justices.
" M. H. COFER, }
" J. M. ELLIOTT, }

IT IS THE DUTY OF A RAILROAD COMPANY to cause signals to be given, where the safety of travelers on intersecting roads demands that a warning should be given of approaching trains; and a habitual failure to give such signals, or warnings, is an offense against the public—an indictable nuisance.

APPEAL from Marion Circuit Court.

R. H. Rountree, for appellant;

"*A public offense*, in the meaning of this Code, is any act or omission for which the law has prescribed a punishment." Criminal Code, sec. 1. "All public offenses may be prosecuted by indictment, except public officers." Criminal Code, sec. 6. An indictment may be set aside when it "was not found and prosecuted as required by this Code." Sub-sec. 3 of sec. 159. The indictment in this case was insufficient, and ought to have been quashed or set aside on the demurrer of appellant, because it does not state facts which constitute an offense for which the law of this state has prescribed a punishment.

There is no statute requiring a railroad company to carry on its trains a bell, or to ring a bell, or to carry or blow a steam-whistle at highway crossings or other places, or requiring its trains to move slow or fast at highway crossings—there is no statutory provision on this subject, and, therefore, if any law is violated by the facts charged in the indictment, it must be the common law (1 Kent, 470); and the common law does not require a railroad company to carry or ring a bell or blow a steam whistle at a highway crossing. See Angell and Ames on Corporations, sec. 394; 2 Redfield on Railways, p. 368, chap. 30, sec. 225, sub-sec. 3, 369, and sub-sec. 6; Wood on Law of Nuisance, p. 2, and note, and pp. 788, 790, 791.

Thomas E. Moss, attorney-general, for appellee, cited in argument 3 Blackstone, p. 216; People v. Sands, 1 Johns.; Commonwealth v. Rand., 6 Rand; Wharton, sec. 2370; Wood on Law of Nuisance, secs. 747 to 754, and cases cited.

COFER, J., delivered the opinion of the court:

Although the appellant's charter authorizes it to operate its road by running trains thereon, and does not limit the speed at which they may be run, nor require it to ring a bell or blow a whistle at the crossings of public roads, it does not necessarily follow that to omit to give one of these signals, or to take other precautions to avoid injuring persons traveling on intersecting highways, is not a public offense. It is implied in every grant of corporate privileges that the grantee shall use reasonable and ordinary care and caution to avoid injuring individuals or the general public.

If a business is, in its nature, hazardous to others, the law requires of those engaged in that business, whether they be natural or artificial persons, to use such care and caution in its prosecution as common prudence demands. If, as the jury has found, the safety of travelers crossing the appellant's road demands that warning should be given of the approach of trains, then it is appellant's duty to cause such signals to be given, and its habitual failure is an offense against the public.

A thing which may be lawfully done may, because of the manner of doing it, become unlawful. As, for instance, a city may lawfully excavate in a street for the purpose of constructing sewers and cisterns, or for the purpose of laying water or gas-pipes, yet the city may, by the careless or unskillful manner of doing so, be guilty of a nuisance. So it is not unlawful for a railroad, turnpike road, or canal company, having authority to construct its work across a public highway, to make an excavation or embankment across such highway in order to construct its own way, but it must take proper precautions for the convenience and safety of the public while the work is in progress. So, too, it is not unlawful for the owner of an estate to blast rock near to a highway, but if many persons are accustomed to travel the highway at all times during the day, it would be the plain duty of the owner of the estate to give warning when a blast was about to be made, so that those near by might secure their own safety by getting or remaining beyond the reach of harm; and there can be no doubt but habitual blasting, under the circumstances supposed, without the reasonable and necessary precaution necessary to secure the safety of travelers, would render the owner of the estate amenable to a public prosecution for a nuisance.

The appellant may lawfully run its trains at any reasonable rate of speed, but it is bound to take reasonable precautions to prevent the enjoyment of its privilege from injuring those crossing its road upon public highways. Their rights are equal to those of the appellant, and each must so enjoy his or its own as not unnecessarily to imperil the safety or impair the privileges of the other.

There is nothing in these views in conflict with the case of Rex v. Pease, 4 Barnwall & Adolphus, 17, cited by appellant's counsel,

The alleged nuisance in that case consisted in running locomotives and trains, which made great noise, along the railway track which was parallel with and very near to a public road. The railway company's charter authorized it to locate its road just where it was located, and to operate trains on its track. The indictment was for doing the very things authorized by the charter. There was no attempt to hold the defendant liable for failing to use reasonable and necessary precautions in doing what it was authorized by its charter to do. On the contrary, the jury found expressly that all reasonable precautions consistent with the use of the road had been taken.

If this indictment had been for running the appellant's trains along or across the turnpike road, whereby the safety of travelers was imperiled, without any charge of a lack of reasonable precautions to avoid injury to those passing on the road, the case would have been analogous. That was an indictment for doing a lawful thing, and no more; this is an indictment for doing a lawful thing in an unlawful way.

Tested by these principles the indictment in this case was good, and the instructions were not prejudicial to the appellant.

Judgment affirmed.

SET-OFF—PRINCIPAL AND SURETY.

HIMROD v. BAUGH.

Supreme Court of Illinois, June Term, 1877.

[Filed October 20, 1877.]

HON. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

WHATEVER, not merely personal, would be a matter of defense for the principal debtor, were he sued alone, should be admitted as a defense in favor of the principal and surety when they are sued together. The principal debtor is the real debtor, and the surety but security for the payment of the principal's separate debt; and off-setting a demand in favor of the principal debtor alone, when sued with his surety, is setting off against each other what may be regarded as essentially mutual debts.

SHELDON, J., delivered the opinion of the court:

This was a suit upon an appeal bond executed by George Himrod, John B. Lovingston and Mortimer Millard, to Thomas Baugh, on the 31st day of October, 1872, upon an appeal to the Circuit Court of St. Clair County, from a judgment recovered by said Baugh against said Himrod and A. E. Ellithorpe, on the 30th day of October, 1872, in the city court of East St. Louis, for the sum of $338.95 and costs of suit.

The declaration avers that, at the April term of such circuit court, on the 20th day of April, 1874, the judgment appealed from was affirmed, and the appeal dismissed for want of prosecution. The breach assigned is the non-payment of the judgment. The suit was brought for the use of Levi Baugh, to whom, it is alleged, the judgment was assigned for a valuable consideration, on the 2d day of June, 1874. Judgment was given for the plaintiff, the damages being assessed at $453.90, and the defendants appealed to this court,

The error assigned is in sustaining a demurrer to the defendant's special plea of set-off.

The plea was, in substance, that one Neiderfeldt obtained two judgments against the said Thomas Baugh on the 4th day of March, 1874, one for $182.32, and the other for $76.25; that, subsequently, there was a garnishee proceeding instituted upon the judgments against the aforesaid Himrod and Ellithorpe, as garnishees of Thomas Baugh; that, on the 11th day of June, 1874, judgment was rendered against them in that proceeding as such garnishees, for the sum of $187.67

and $3.60 costs of suit; that afterwards, on the 5th day of September, 1874, upon another like garnishee proceeding upon said judgment in favor of Neiderfeldt, there was another judgment rendered against Himrod and Ellithorpe, as garnishees of Thomas Baugh, for the sum of $86.90 and $3.60 costs, whereby the said Himrod and Ellithorpe became bound to pay the amount of the said two garnishee judgments to the said Neiderfeldt instead of to the said Thomas Baugh; that, further, at the April term, 1874, of the Circuit Court of St. Clair County, the said Himrod and Ellithorpe recovered a judgment against the said Thomas Baugh for the sum of $52 and costs, which is still unpaid and unsatisfied, all of which occurred before the said Himrod and Ellithorpe had any notice of the pretended assignment to Levi Baugh of the judgment named in the appeal bond; that Himrod and Ellithorpe had paid the garnishee judgments, and they were willing that the said several judgments should be applied in the satisfaction of the judgment of Thomas Baugh against them; that the said Lovingston and Millard were mere sureties for Himrod and Ellithorpe in the appeal bond.

Although, according to the averment of the declaration, the judgment of Thomas Baugh against Himrod and Ellithorpe was assigned to Levi Baugh on the 2d day of June, 1874, and the garnishee judgments against Himrod and Ellithorpe, as garnishees of Thomas Baugh, were not obtained until after that time, as stated in the plea, viz., on the 11th of June and the 5th of September thereafter, yet the plea avers a want of any notice of the assignment when the garnishee judgments were rendered.

After notice of the assignment of the judgment to Levi Baugh, Himrod and Ellithorpe would have been bound to pay the same to him, and if they had notice of the assignment at the time, they might have made answer of such facts in the garnishee proceedings and have protected themselves from a judgment against them as garnishees of Thomas Baugh, as owing the judgment to him. But, until notice of the assignment, they were justified in dealing, with respect to the judgment, as belonging to Thomas Baugh, who recovered it, and having no such notice they could but make answer as garnishees of their indebtedness to Thomas Baugh upon the judgment. The garnishee judgments were properly rendered against the garnishees without fault on their part, and having been paid should be held to operate as an extinguishment or satisfaction *pro tanto* of Thomas Baugh against them. Minard v. Lawler, 26 Ill. 301; Drake on Attachment, § 710. It does not appear that Himrod and Ellithorpe were indebted to Thomas Baugh otherwise than upon the judgment named in the appeal bond.

The judgment for $52 and costs, recovered by Himrod and Ellithorpe against Thomas Baugh, stands upon a somewhat different footing. This recovery was previous to the assignment of the judgment in suit; the assignee took the assignment, of course, subject to all defenses existing at the time against the assignor. This judgment however, is but strictly matter of set-off, and it is in favor of Himrod and Ellithorpe, and not in favor of Himrod, Lovingston and Millard, these defendants, and it is the general rule that demands to be set off must be mutual, as respects the parties, due from the plaintiff to the defendants; that joint and separate debts can not be set off against each other. But Himrod and Ellithorpe are here the principal debtors, and Lovingston and Millard only their sureties, and such a circumstance has been admitted by some courts of respectable authority as creating an exception to the general rule, they holding that a claim of the principal debtor against the plaintiff may be set off in an action against the principal and his sureties. Mahurin v. Pearson, 8 N. H. 539; Concord v. Pillsbury, 33 id. 310; Brundridge v. Whitcomb, 1 Chipman, 180.

We are inclined to accept the rule of these authorities. It seems to be in consonance with the equitable principles which so largely govern the relation of principal and surety, and we are struck with the fitness of allowing whatever, not merely personal, would be matter of defense for the principal debtor, were he sued alone, to be admitted as a defense in favor of the principal and surety when they are sued together. The principal debtor is the real debtor, and the surety but security for the payment of the principal's separate debt; and off-setting a demand in favor of the principal debtor alone, when sued with his surety, is setting off against each other what may be regarded as essentially mutual debts. See, too, Waterman on Set-off, § 237; Bourne v. Benett *et al.*, 4 Bing. 423. In *Ex parte* Hanson, 18 Vesey, 232, it was observed by Lord Eldon, in reference to the indebtedness of principal and surety on a joint bond, that the joint debt was nothing more than *a security for a separate debt*.

We are of opinion that the court below erred in sustaining the demurrer to the plea, and the judgment is reversed and the cause remanded.

JUDGMENT REVERSED.

SCHOLFIELD, C. J., and WALKER, J.: We are unable to concur in the decision in this case. The rule of set-oft adopted by this opinion is opposed to the current of authority, if not the former decisions of this court.

WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

COCHRAN *ET AL.* v. RIPPY *ET AL.*

Court of Appeals of Kentucky, September Term, 1877.

[Filed December 15th, 1877.]

Hon. WM. LINDSAY, Chief Justice.
" W. S. PRYOR, } Associate Justices.
" M. H. COFER, }
" J. M. ELLIOTT, }

1. KENTUCKY STATUTE AS TO WAREHOUSES.—The "Act in relation to warehouses and warehousemen's receipts," of March 6, 1869, is not repugnant to or embraced in any general law or provision of, or repealed by the General Statutes, and is therefore in full force.

2. WAREHOUSEMEN'S RECEIPTS ARE NEGOTIABLE

and transferable by indorsement in blank, or by special indorsement, the indorsers being liable as are indorsers of bills of exchange.

3. THE WAREHOUSEMAN MUST BE IN POSSESSION OF THE GOODS at the time he executes a receipt or voucher—the goods must be stored in the warehouse kept by him and under his care and control. A warehouseman's receipts for goods not in his warehouse at the time of the execution and delivery of the receipts, although he was the owner, can not pass any right or title to the holder of such receipts so as to affect innocent third parties. But after removing the goods to his warehouse the warehouseman might, by a subsequent stipulation or ratification of his original contract, before the right of others intervened, again pledge the property to secure the liability, for the security of which the original receipts were given.

4. THE VALIDITY OF THE RECEIPTS WAS NOT AFFECTED in the hands of a *bona-fide* holder by the fact that in giving the original receipts for goods not then in his warehouse and under his control the warehouseman violated and incurred the penalties prescribed by the statute.

James Speed and *Geo. Weissenger*, for appellants; *W. O. & J. L. Dodd*, for appellees.

PRYOR, J., delivered the opinion of the court:

The appellants, Cochran & Fulton, merchants of the city of Louisville, advanced to one Wm. H. Shipman, of Lawrenceburg, Ky., seven thousand five hundred dollars in their two acceptances, payable in four months from the 16th of May, 1874. For the purpose of securing the appellants, Shipman gave them a warehouse receipt for ninety-five barrels of whisky, reading as follows:

"Received, May 16th, 1874, of Cochran & Fulton, on storage in my warehouse, situated in Lawrenceburg, Ky., ninety-five barrels of T. B. Rippy whisky, made in the month of April, 1873, marked with the serial numbers 570 to 574, and 635 to 724, inclusive, containing 3,859.65 gallons; which whisky is covered by insurance, and is held for said Cochran & Fulton in storage, and is deliverable only on the surrender of this certificate.

[Signed] W. H. SHIPMAN."

On the 10th of June, 1874, they made another advance of about $5,000, which was secured by the execution and delivery of a receipt for 100 barrels of whisky, of the make of 1873. This receipt was of the same character as the one already recited This money was raised on Shipman's note, indorsed by the appellants. The two acceptances dated on the 16th of May, 1874 having matured were renewed by the three notes of Cochran & Fulton to Shipman, at four months, the notes dated the 11th, 16th and 19th of September, 1874. When this renewal took place, the two receipts given by Shipman for the 95 and the 100 barrels of whisky were surrendered to him by the appellants, and new receipts executed and delivered, covering the same whisky. These last receipts are made to bear the same date as the original receipts, and are similar to those surrendered, with these words added: "*Which is executed under, and in conformity with the warehouse laws of the state, and subject to its terms and penalties.*" Why these last receipts were antedated does not appear, but that they were in fact executed and delivered on the 17th of September, 1874, clearly appears. After the maturity of these last notes they were again renewed, the appellants still holding the receipts to indemnify them against loss. When the original receipts were executed and delivered, the whisky they purported to represent, although owned by Shipman, was not in fact in his warehouse, but in a bonded warehouse in the same county known as the Rippy warehouse.

On the 17th of June, 1874, the whisky was removed from Rippy's warehouse by Shipman to his own warehouse in Lawrenceburg—the house in which he professed to have it stored at the time he gave to appellants the first receipt. So the whisky was in fact in Shipman's warehouse in September, 1874, when the original receipts were surrendered, and another receipt substituted, conforming, as the parties supposed, to the warehouse laws of the state.

Shipman was a warehouseman, engaged in making and selling whisky in the county of Anderson, and the appellants were merchants in the city of Louisville, making purchases and sales of whisky on commission, and were ignorant of the fact that the whisky was not in Shipman's warehouse when the original receipts were delivered, but relied entirely on the statements of Shipman in that regard.

On the 27th of October, 1874, Shipman shipped 45 barrels of this whisky to E. H. Taylor, a dealer in the city of Frankfort, and on the 22d of January, 1875, Taylor, by Shipman's order, forwarded thirty barrels of this whisky to the appellees, Rippy, Hardie & Co., at Louisville. Shipman failed, and the appellants, ascertaining that Rippy, Hardie & Co. had thirty barrels of this whisky in their possession, instituted the present action against them for its recovery, obtained an order for its delivery, and the sheriff, finding nineteen barrels of the whisky with the appellees, took possession of it and delivered it to appellants.

The appellants maintain that they are entitled to recover by virtue of the warehouse receipts held by them; and the appellees, by their assignee (they having gone into bankruptcy), deny the right of recovery, and say they were vested with the title by reason of their purchase in January, 1875. The case comes to this court without instructions, the law and facts having been submitted to the court, and a judgment rendered for the defendant.

The issue made involves the construction of the act entitled "An act in relation to warehousemen and warehouse receipts," approved March 6th, 1869. The first section of that act makes "all persons, firms, corporations, companies, etc., who shall receive cotton, tobacco, pork, corn, whisky, etc., or any kind of merchandise, etc., or any description of personal property whatever in store, or undertaking to receive or take care of the same, with or without compensation, warehousemen." By section two, every warehouseman receiving anything enumerated in section one, on demand of the owner, or the person from whom he received the same, shall give a receipt therefor, setting forth the quality, quantity, kind and description thereof, and which shall be designated by some mark, and which receipt shall be evidence in any action

against the warehouseman. All receipts so issued, by the third section of the act, are made negotiable and transferable by indorsement in blank or by special indorsement, and with like liability as bills of exchange now are, and with like remedy thereon. Section 4 provides that no warehouseman shall issue any receipt or voucher for any goods, wares, etc., to any person or persons, corporations or companies, etc., unless the goods, wares, etc., shall have been *bona fide received into possession and store by such* warehouseman or other person, and shall be in store, under his or their control, care and keeping at the time of issuing such receipts. By the 5th section, no warehouseman or other person shall issue any receipt for any goods, wares, etc., to any person, corporations, companies, etc., as security for any money loaned, or other indebtedness, unless such goods, wares, merchandise, produce, etc., or other thing receipted for, shall be, at the time of issuing such receipt or voucher, the property, without *encumbrance*, of said warehousemen, and if encumbered by prior lien, then the character and extent of the lien shall be fully set forth and explained in the receipt, and shall be, actually and in fact, in store and under the control of said warehousemen at the time of giving the receipt or voucher. Section 6 prohibits the warehouseman from executing any receipt for goods, etc., while any former receipt for the goods, or any part thereof, shall be outstanding and uncanceled. Section 7 prohibits the warehouseman from selling, encumbering, transferring or removing, beyond his immediate control, any goods, produce, etc., for which a receipt or voucher has been given, without the written consent of the person or persons holding the receipt, and the production of the receipt. Section 8 provides that any warehouseman or other person, who shall, wilfully and knowingly violate any one, or any part of the provisions of the foregoing act, shall be deemed a cheat and a swindler, and subject to indictment, and, upon conviction, shall be fined not exceeding five thousand dollars, and imprisoned in the penitentiary of this state not exceeding five years. The act also provides that the party injured by the violation of the act may have an action against the wrong-doer for all the damages he may have sustained, etc.

Preliminary to the consideration of the principal questions made in the case, it is proper to notice the suggestions of counsel that the act of March 6th, 1869, was repealed by the adoption of the General Statutes. By the second section of the act adopting the General Statutes, all statutes of a general nature in force when the General Statutes took effect, and which were repugnant thereto, were repealed. In the case of Broaddus' devisees v. Broaddus' heirs, 10 Bush, 299, it is said: "This court can not, therefore, look to the Revised Statutes to supply any defect that may appear in the general law embodied in the General Statutes, except such laws as are expressly left unrepealed by subsections 1, 2, etc., of the act adopting the General Statutes."

There is nothing in the act of 1869 repugnant to any general law found in the General Statutes. The pledge or transfer of warehouse receipts is not embraced by that section of the General Statutes in reference to deeds of trust and mortgages. Deeds of trust and mortgages are not valid against purchasers for value without notice, or against creditors until they are acknowledged or proven according to law, and lodged for record. The right to pledge or pawn goods as a security for the payment of a debt existed independently of the statute, and was made to rest upon the doctrine of the common law. It is a bailment of personal property only, and the right in the bailee or pledgee is never consummated until the latter has possession of the property. This subject is not treated of, by or under any law found in the General Statutes, nor is the manner of creating such a pledge, or the right of parties under it, defined or recognized by any of its provisions; nor is the act in the sense and meaning of the repealing clause of the General Statutes repugnant to any provision of the statute against fraudulent conveyances and devises.

The legislature of the state, following the Broaddus case by an act approved March 17, 1876, construed the repealing clause of the General Statutes by providing, viz.: "That no statute of a general nature enacted since the adoption of the Revised Statutes, on the subject-matter of which the General Statutes makes no provision, shall be deemed to be repealed by the act, entitled 'An act to adopt the General Statutes,'" approved April 22, 1873. The act of March 6, 1869, is therefore in force.

The right of the appellant to recover the whisky in controversy is resisted on several grounds:

1st. That a warehouseman can not give a receipt or voucher on his own goods.

2d. That if such right exists, the property must be in his own warehouse at the time the receipt is executed and delivered.

3d. That as the warehouseman (Shipman) violated the provisions of the fifth section of the act by executing a receipt for the whisky when not at the time stored in his warehouse and under his control, he subjected himself to the penalty imposed by the eighth section, and, therefore, the entire transaction was void, and passed no right or title to the appellants.

As to the first proposition made by counsel, it is sufficient to say that this court, in the case of Greenbaum & Brothers v. Megibben, reported 10 Bush, 419, determined this question, and we see no reason for declining to adhere to the law as settled in that case. The fifth section of the act was intended to apply to property owned by warehousemen, and expressly provides that the merchandise, produce, etc., shall be, at the time of issuing the receipt or voucher, *the property, without encumbrance, of said warehouseman*. The object of the act was to enable warehousemen to issue receipts or vouchers for all property stored in their warehouses, whether owned by themselves or others. The warehouseman is required, on demand, by the owner of the goods or produce stored, or the person from whom he received it, to execute a receipt therefor in the manner pre-

scribed by the second section; and by the fifth section may issue a receipt or voucher in his own name upon his own property. These receipts or vouchers have some of the characteristics of commercial paper—no one can obtain the property but the holder of the receipt, unless he produces the written consent of the holder as well as the receipt itself. They are negotiable and transferable by blank indorsement, the indorser being liable as indorsers of bills of exchange; and as to the property owned by the warehouseman, and for which he gives his receipt, he can assert no claim or set-off as against the holder, unless the receipt, on its face, shows such right to exist. The act was designed to advance the commercial interests of the state in affording facilities for making sales of personal property in warehouses without an actual delivery, and to enable owners, by the transfer of warehouse receipts, to pledge the property for the advance of money or the payment of debts; and the fact that the warehouseman might deceive those with whom he trades, is no answer to the express language of the statute. The validity and fairness of nearly all commercial transactions must, to a great extent, depend upon the integrity of business men; and whether so or not, this court has nothing to do with the policy of the statute, nor are we required to say that it has answered the purposes of its enactment.

As to the second proposition, it is conceded by counsel for the appellants that, at the date of the execution of the receipts embracing the whisky in controversy, it was in bonded warehouse, in the county of Anderson, known as the Rippy warehouse, and therefore the statement on the face of the receipt that it was in Shipman's warehouse is false. If the receipts or vouchers had been executed by Rippy, in whose warehouse the whisky was stored, to Shipman, and then passed to the appellants, there could have been no question as to the right of recovery on the part of appellants, either under the statute or by the rule of the common law. This court, in the case of Newcomb, Buchanan & Co. v. Cabell, reported 10 Bush, 460, passed upon this question, and held that a symbolical delivery of the property was sufficient. The character of symbol that would, in construction of law, pass the possession to one making an absolute purchase, would pass a like possession to a party holding the property in pledge to secure the payment of a debt. Story, in his treatise on Bailments, says that "goods in a warehouse may be transferred by a symbolic delivery of the key;" and, in fact, this doctrine is so well recognzied as not to require authority in support of it. In this case, however, the original receipts upon which appellants made the advances could not have given them a constructive possession, as they recite that the whisky was in the warehouse of Shipman, when, in fact, it was in the warehouse of Rippy, and neither at common law nor under the statute could such a transfer affect the rights of innocent purchasers. Possession being essential to the validity of a pledge, the pledging of whisky in Shipman's warehouse would not pass the possession to whisky in Rippy's warehouse.

We understand that the act of 1869 applies only to *warehouse* receipts or vouchers given by the warehouseman, and that the latter must be in possession of the goods at the time such writings are executed. The goods or produce must be stored in his warehouse, or the warehouse kept by him, and the goods under his control at the time; and when he undertakes to execute receipts or vouchers to third parties for property belonging to himself and stored in the warehouse kept by and under the control of another, the rights of parties thus acquired must be governed alone by the rules of common law. *All receipts issued by any warehouseman, as provided by this act, shall be negotiable and transferable* by, etc. See 3d section. The words, *other person or persons*, used in the several sections, must be construed as applying to persons who have obtained the warehouse receipts from the warehouseman, and in the eighth section to all those violating the provisions of the act.

A party having property stored in a warehouse may sell or dispose of the same in the absence of a warehouse receipt, and this right is not taken from him by statute. Under the statute, if the party giving the receipt or voucher is a warehouseman and the goods at the time are in his warehouse, and under his control and care, the indorsement or transfer of the receipt or voucher by the owner, or the giving of the receipt or voucher by the warehouseman, if he is the owner, will vest in the purchaser or pledgee a right to the property, and no one is entitled to it without the written consent of the party to whom the transfer is made, and the production of the receipt.

In this case it is manifest that no right or title, so as to affect third parties, passed to appellants at the time the original receipts were executed, for the reason that the whisky was not in Shipman's warehouse, but in the warehouse of Rippy. It appears, however, from the proof, that Shipman removed this same whisky from Rippy's warehouse into his (Shipman's) warehouse as early as the 17th of June, 1874, and that, on the 16th of September, 1874, when the acceptances fell due upon which appellants were bound, the paper was renewed, and the original receipts executed in the months of May and June surrendered, and the receipts renewed, other receipts having been given of the same tenor, with the words added: "Which is executed under and in conformity with the warehouse law of this State, and subject to its terms and penalties." The liability of the appellants was continued on the bills by the renewal, and the security made complete by the execution and delivery of the receipts at a time when the whisky was in fact in Shipman's warehouse and under his control. No purchaser had, in the meantime, intervened, and Shipman, with the whisky in his warehouse, and when he was in a condition to comply with the statute, renewed his receipts. It is true the receipts are dated as of the original receipts executed in May, 1874, but it is an undisputed fact that the receipts were renewed and the old ones surrendered in September, 1874, when the liability of the appellants was continued by

the renewal of the bills. There is no testimony in the case showing that the appellants, at the time the original receipts were executed, had knowledge of the fact that the whisky was in Rippy's warehouse, and the best of faith is to be found in the acts of both the appellants and appellees in the transaction. Although the original receipts did not vest the appellants with the title or possession as against innocent purchasers, still we perceive no reason why the parties, before the rights of others intervened, should not be allowed, by a subsequent stipulation or ratification of the original contract, to again pledge the property to secure the liability. The old maxim, "*that he who trusts most must lose most*," does not apply in this case. This is not a question between innocent purchasers. A special interest in the whisky passed to the appellants by reason of the pledge made in September, 1874. The possession of the receipt was, in contemplation of law, the possession of the whisky, and neither the warehouseman nor other person could divest appellants of this right and possession without their consent. The appellees purchased in good faith, but the title they acquired can not affect the rights of appellants, who had previously obtained an interest in, as well as a constructive possession of the whisky. It is not necessary to determine whether the mere removal of the whisky to the proper warehouse by Shipman, after the delivery of the receipt, could have vested appellants with the possession, and made Shipman their bailee. Such a question is not material to the present controversy.

As to the third proposition, it is evident that the penalty imposed on warehousemen and others who shall knowingly and wilfully violate the provisions of the law, was intended to secure innocent parties from the frauds that might be practiced in the giving of false receipts; and while certain acts are prohibited, and a penalty imposed upon the party committing the wrong, we are not disposed to extend the punishment by declaring the contract void as to the innocent party, and thereby inflict punishment on those whose interests it was the object of the statute to protect. The purpose of the penalty was to prevent fraud, and for the protection of those who might come into the possession of warehouse receipts.

We recognize the fact that, as a general rule, there is no distinction between *mala prohibita* and *mala in se*, but as said by Mr. Justice Wayne, in the case of Harris v. Runnels, 12 How. 79. "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void. * * * It does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it."

And in this case, although the original liability was created upon the pledge of a receipt prohibited from being issued by the warehouseman, as the property was not in his warehouse, yet the subsequent delivery of the receipts by the renewal in September, 1874, upon the consideration that the liability should continue, was not in violation of the statute, or based upon any illegal consideration. We are satisfied, however, that it was never contemplated by the law-making power that the innocent party should be denied all remedy upon the contract as against the party violating the statute. Such an interpretation would defeat the purpose and policy of the statute by aiding the guilty and punishing the innocent. Conceding the facts relied on by the appellees as a defense to the action, to be true, the appellants were entitled to recover.

The judgment is reversed and cause remanded, with directions to award a new trial, and for further proceedings consistent with this opinion.

THE DEGREES OF MURDER—A REVIEW OF THE WIENERS' CASE.

1. In State v. Schoenwald, 31 Mo. 147, the learned judge, speaking for the court, says in respect to malice: "The best definition of malice to be met with is that given by Justice Bayley, in Bromage v. Brosser, 4 Barn. & Cres. 255: Malice, says he, in common acceptation, means ill-will against a person; but in its legal sense, it means a wrongful act done intentionally, without just cause or excuse."

In State v. Joeckel, 44 Mo. 234, the trial court instructed the jury in respect to malice that "malice, as known to the law, does not mean mere spite, ill-will, or dislike, as it is ordinarily understood, but, as applicable to this case, it means the intentional doing of a wrongful act without just cause or excuse;" and Wagner, J., delivering the opinion of the court, says: "The instructions state the law with clearness and precision." In Buckley v. Knapp, 48 Mo. 152, malice is similarly defined.

I have not the authority in Bromage v. Brosser, *supra*, at hand, but I believe it was a case of libel or slander. The case of Buckley v. Knapp, *supra*, was a case of libel. The Schoenwald and Joeckel cases, *supra*, were cases of murder. To say that "the intentional doing of a wrongful act" defines that malice aforethought which distinguishes the crime of murder from manslaughter, has always, to my mind, led to an absurdity. 3 Central Law Journal, 566. In voluntary manslaughter, the slayer intentionally does a wrongful act, and if we apply the definition above quoted, it is also a malicious act, and if it is malicious, it is murder, and not manslaughter.

The criticism of the learned judge who delivered the opinion in Wieners' case 6 Cent. L. J. 70, is conclusive, and leaves it quite clear that whatever malice in murder is, it is not simply "the intentional doing of a wrongful act."

2. That the law presumes malice from a certain state of facts, or that the law presumes, or conclusively presumes a certain intent from certain acts proved, are speculations taken from the old schoolmen—"speculations which roam over all creation, without possibly touching any real case." To trace the thought suggested by them, leads the

average legal mind into a wilderness of speculation and doubt, from which it is fortunate if he escape without a severe headache. Malice is a condition of the mind; and whether that condition of the mind existed at the time of the killing is a question of fact, and may be proved by direct evidence, as by a witness who heard the slayer express his purpose, or by circumstantial evidence, as by proving the means employed, the weapon used, or other facts which tend to show the intent and purpose with which the act was done, just like any other fact in the case may be proved, by proving the circumstances preceding and accompanying the act. Mr. Wharton, in his valuable work on Homicide, 2d ed., section 30, says: "When one person kills another with a sedate, deliberate mind and formed design, malice is said to be *express*. Of this the usual evidence is circumstantial; such, for instance, as lying in wait, antecedent menaces, former grudges and concerted schemes to do the party some bodily harm." "But even though no circumstances, prior in date to the fatal act, are in evidence from which malice may be inferred, yet the character of the injury often supplies means from which such inferences may be made."

Again, in speaking of intent, section 32, Mr. Wharton says: "No human gauge existing by which duration of intent can be measured, we are obliged to resort for this purpose to the same probable reasoning by which the existence of intent is proved. A shoots B in the public streets, without authority and without provocation. As reasonable beings usually premeditate any important step they take, we infer that A premeditated this shot; and this inference is sufficient proof, in the lack of all other evidence, of premeditation." Again, in section 33, he says: "From the very fact of a blow being struck, we have a right to infer (as a presumption of fact, but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant." Again, the same authority, section 664, says: "No case can arise in which there is not some distinctive incident capable of either strengthening or weakening the proof of malicious intent." In section 669, of the same authority, it is said: "In several of the opinions which have just been cited occurs the expression, that when the mere act of killing is proved, without anything more, malice is to be presumed. This, however, is an axiom handed down to us from the scholastic jurisprudence, and has no application to any case that can arise in a court for the trial of real causes * * * * * * * * What the law punishes, is not *killing*, but *particular modes of killing*, and those must be averred and proved. Now these modes, when proved, form facts from which intent is to be inferred or negatived. It is, therefore, announcing a proposition purely speculative and irrelevant to tell a jury that an abstract killing involves, as a matter of law, an abstract intent. It is perfectly proper, however, to tell a jury that, from certain circumstances— e. g., a deadly weapon, repeated and dangerous wounds, threats—intent and malice may be rightly inferred as inferences of fact. * * * When we apply this test, the apparent conflict between the opinions of American courts vanishes."

3. The learned judge in the case before me, in adopting the doctrine of a conclusive presumption of intent to kill, from proof of an intent to commit a collateral felony, adopts the earliest view of the subject, and one which can not be supported by reason or the weight of modern authority. When all felonies were punished with death, it was a matter of indifference to the offender whether he was hung for robbery or for murder committed in attempting to rob. The reason of the rule was claimed to be that, if a man has a felonious intent, and when executing this intent, he commits a felony different from the one intended, then the felonious intent may be tacked to the unintended felony. Whar. on Hom, see 59. I think the learned judge will not find authority, even in the old rule, for his conclusive legal presumption of intent to kill from intent to commit a collateral felony.

"Yet, peremptory as has been the assertion of this principle, there is reported no modern conviction of common law murder in a case in which there was no evidence of malicious intent towards the deceased, and in which the felonious intent proved was simply an intent to commit a collateral felony. And that an intent to commit larceny cannot be now used to prove an intent to kill is emphatically declared by a learned English judge, (Blackburn, J.) in his testimony, in 1874, before the Homicide Amendment Committee, as given in a note to this paragraph."

In the testimony of Judge Blackburn, referred to, I find Mr. Russell Gurney put this question to the judge: "There is not a single text-book, is there, where it is not laid down to be murder if you cause death in the prosecution of a felony?" Judge Blackburn replied: "I think that, in all of them, they do lay it down; they cite that statement of Lord Coke's, and that later case, and they all say that there it is put down; but I do not think that there will be found any instance in which that has ever been acted upon, and I am confident it would not be acted upon now." See also Whar. on Hom, 2d ed., secs. 57-63.

When the intent to kill upon sudden impulse, but without lawful provocation, is executed the instant it is conceived, or before there has been time for the passion to subside, it is said to be murder in the second degree. As to the correctness of this proposition, there need be no controversy. In respect to deliberation, it is said in the opinion: "A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose." In State v. Hays, 23 Mo. 287, the instruction upon this subject was: "The deliberation and premeditation necessary to constitute murder in the first degree may be inferred from the circumstances of the killing; and if they existed for a moment as well as for an hour or a day before the killing, it is sufficient." Here, then, is the distinction finely drawn. If the intention to kill is executed the *instant* it is conceived, it is murder in the second degree. If there is a *moment*

for deliberation and premeditation it is enough, and the offense is murder in the first degree. Here we have human life hanging upon the distinction in point of time between an *instant* and a *moment*, and the court, as a matter of law, determines as to which degree the instructions ought to be limited. I agree that "the law assigns no limits within which the cooling time may be said to take place," and that "every case must depend on its own circumstances."

Under the facts, Wieners was clearly guilty of murder; but, to my mind, the law does not know in which degree. The jury were forced to the alternative of finding him guilty in the first degree or of acquitting him. Perhaps public sentiment would stoutly have opposed an acquittal. If so, his conviction in the first degree may not have been the absolute conviction of the minds of the jury. If the proposition laid down by the court narrow the final distinction between the two degrees of murder to the difference of time between an *instant* and a *moment*, I insist, that whether the facts proved constitute the one degree or the other is not a question of law for the court, but of fact for the jury, which they can not rationally determine without instructions as to both degrees.

I would never hang a man for killing another in an altercation under our law as it now stands, except where the proof clearly showed that the altercation was brought on by the accused as a mere pretext, and for the purpose of preparing an excuse to kill, unless the law as to murder in both degrees had been substantially stated to the jury, and they had been left untrameled to determine from the evidence whether the killing was on the impulse and in a passion, or deliberate and premeditated. J. H. S.

ABSTRACT OF DECISIONS OF SUPREME COURT OF THE UNITED STATES.

REVENUE LAWS—UNSTAMPED SPIRITS—FORFEITURE.—Where a rectifier or wholesale liquor dealer knowingly omits to cause packages of distilled spirits containing more than twenty gallons each, on his premises, to be gauged, inspected and stamped, in accordance with section 25 of the act of July 20, 1868, the property is liable to forfeiture under section 57 of the act, but the forfeiture imposed by section 96 does not apply. And it can not be made to apply by any rules which the commissioner of internal revenue prescribes under section 2 of the act. *United States v. Two Hundred Barrels of Whiskey.* Appeal from the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

INSOLVENCY — FRAUDULENT PREFERENCE—REASONABLE CAUSE.—The Merchants National Bank of Cincinnati, plaintiff in error, advanced to one H., who was a banker, on his check, $10,000, less the usual charge of 1-8 per cent. On the afternoon of the same day, H. placed in an envelope, addressed to the bank a note in which he said: "A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security." *Held*, that the securities were transferred with a view to give a fraudulent preference, and that the bank had reasonable cause to believe that H. was insolvent when it received and appropriated the securities presented to it. "It is scarcely necessary to discuss the authorities as to the meaning of the words 'having reasonable cause to believe the party to be insolvent.' When the condition of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe. Toof v. Martin, 13 Wall. 50; Buchanan v. Smith, 16 Wall. 277; Wager v. Hall, ib. 584. There is nothing in the subsequent decisions of this court to vary these principles, and it is not worth while to go through the English cases founded upon a statute containing different language from our own." *Merchants Nat. Bk. of Cincinnati v. Cook et al.* Appeal from the Circuit Court of the United States for the Southern District of Ohio. Opinion by Mr. Justice HUNT. Judgment affirmed.

PRE-EMPTION OF LAND CLAIMED UNDER MEXICAN TITLES.—1. Under the Mexican law, when a grant of land is made by the government, a formal delivery of possession to the grantee by a magistrate of the vicinage is essential to the complete investiture of title. This proceeding, called in the language of the country the delivery of judicial possession, involves the establishment of the boundaries of the land granted when there is any uncertainty with respect to them. A record of the proceeding is preserved by the magistrate and a copy delivered to the grantee. 2. Unless there is something in the decree of the tribunals of the United States confirming a claim to land under a Mexican grant otherwise limiting the extent or form of the tract, the boundaries thus established should control the officers of the United States in surveying the land. Graham v. United States, 4 Wall.; Pico v. United States, 5 id. 3. A survey of a claim thus confirmed made by a surveyor-general of the United States is inoperative, if contested, until finally approved by the land department at Washington. 4. Where a quantity of land in California was granted by the Mexican government within boundaries embracing a larger amount, in the possession of which larger amount the grantee was placed, he is entitled to retain possession of the entire tract until the quantity granted is segregated by the officers of the government and set apart to him, and he may maintain ejectment for the entire tract or any portion of it against parties claiming possession under the pre-emption laws of the United States. 5. Lands claimed under Mexican grants in California are excluded from settlement under the pre-emption laws, so long as the claims of the grantees remain undetermined by the tribunals and officers of the United States. Cornwell v. Culver, 16 Cal. 429; Riley v. Heisch, 18 ib. 198; Mahoney v. Van Winkle, 21 ib. 552. *Van Reynegan v. Bolton.* In error to the Circuit Court of the United States for the District of California. Opinion by Mr. Justice FIELD. Judgment affirmed.

APPEAL BY PARTY NOT INJURED BY DECREE.—One Strang brought an action in the Federal court to foreclose a mortgage upon a railroad. Subsequently the N. & S. A. R. R. was, upon its own application, made a defendant in the foreclosure suit, it claiming to hold a mortgage prior to that of Strang. Thereafter, one Young, holding a statutory lien upon the same property, commenced an action in the United States Circuit Court to enforce the statutory lien, and Strang, the trustees under the Strang mortgage, and the N. & S. A. R. R. were made parties, and the latter in its answer claimed priority to the other incumbrances. Subsequently the Strang suit was transferred to the United States Circuit Court. The suits were heard together, and a decision was made in favor of the N. & S. A. R. R., and subsequently, upon the application of that company, there was a sale ordered and a direction given to first pay the company's claim from the

proceeds. From this order the complainants in the two suits appealed. The next day after the appeal was taken the circuit court again considered the cause, and, upon the application of those holding claims adverse to that of the company mentioned, ordered a consolidation of the two suits and directed a sale of the property subject to the lien of the company. From this decree the company prayed an appeal to operate as a *supersedeas*, offering the proper bond. The circuit court refused to grant the appeal or accept a *supersedeas* bond, being of the opinion that the company had no right to appeal or to give bond to supersede the execution of the decree. The S. & N. A. R. R. thereupon petitioned the supreme court for a *mandamus* requiring the circuit court to grant the appeal and accept a good and sufficient *supersedeas* bond. *Held*, that the petition should be granted. The Court said: "This application is resisted upon the general ground that the S. & N. A. R. R. can not appeal, because its rights are not injuriously affected by the decree. That company was a party to each of the suits consolidated for the purposes of the decree. It was, therefore, a party to the suit as consolidated, and entitled to be heard upon the pleadings as they stood before the consolidation, since no change in that particular was ordered or deemed necessary by the court. Among the pleadings in the Strang suit, thus brought into the consolidated suit, was the cross-bill of this company praying affirmative relief in the final determination of the cause. It matters not that at a former day in the term a special decree had been rendered upon the subject-matter of the cross-bill, and that an appeal from that decree had been taken, for "a cross-bill is a mere auxiliary suit and a dependency of the original." Cross v. Duval, 1 Wall. 14; Ayres v. Carver, 17 How. 595. * * * A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action. 2 Daniel's Ch. 1548. The S. & N. A. R. R. deemed it necessary for the protection of its rights in the mortgaged property, that in any sale which was ordered, provision should be made for the payment of its claim out of the proceeds, insisting for that purpose that its lien was prior in time to that of either of the other mortgage creditors. To accomplish this, a cross-bill was necessary, and it was accordingly filed. The decree upon this bill being under the ruling in Ayres v. Carver, *supra*, interlocutory only, was superseded by that of July 6, which finally disposed of the cause in a manner entirely inconsistent with its provisions. It is clear, therefore, that the decree, as rendered, did, in effect, deny the company the relief it asked, and that, if there were nothing more in the case, redress might be had by an appeal." *Ex parte The North and South Alabama Railroad.* Opinion by Mr. Chief Justice WAITE. Application granted.

NOTES OF RECENT DECISIONS.

BANKRUPTCY OF CORPORATION. — WHEN POLICY-HOLDERS CORPORATORS.—*Re Atlantic Mutual Life Ins. Co.* United States District Court, Northern District of New York, 16 Alb. L. J. 453. Opinion by WALLACE, J. A mutual life insurance company in which the policy-holders were entitled to vote for trustees, and to share in the profits, was placed in the hands of a receiver under the state laws. Subsequently, a trustee of the company filed a petition in bankruptcy in the name of the corporation, and it was adjudged bankrupt. The receiver applied to have the adjudication set aside. *Held*, (1) that the receiver had a standing in court to make the motion; (2) that the question of the solvency of the company could not be examined on the motion, and (3) that the policy-holders of the company were corporators within the meaning of section 122, chap. 6, title 61 of the United States Revised Statutes, and an adjudication in bankruptcy could not be made against the corporation, without giving them an opportunity to be heard.

NEGLIGENCE—PROXIMATE OR REMOTE CAUSE — INTERVENING AGENCY—WHEN PROXIMITY OF CAUSE NOT A QUESTION FOR JURY—UNDISPUTED FACTS.—*Hoag v. L. S. & M. S. R. R.* Supreme Court of Pennsylvania, 4 W. N. 552. Opinion by PAXSON, J. 1. In a case of injury arising from alleged negligence, it is generally the province of the jury to determine the proximity of the cause to the injury complained of; where, however, the presence of an intervening agency is obvious, arising upon undisputed facts, it is not error for the court to withhold the case from the jury. 2. Defendant's railroad ran along the bank of Oil Creek; by reason of a land-slide, unseen by the engineer, an oil train was thrown from the track, the tank cars burst, and the burning oil floated down the stream, causing the destruction of plaintiff's buildings by fire, several hundred feet distant from the place of the railroad accident. *Held*, that the burning of plaintiff's buildings was not such a natural and probable consequence of the negligence of defendant's engineer (if negligence there was) as ought to have been foreseen by him as likely to flow from his act, and, therefore, plaintiff could not recover. *Held further*, that the facts being undisputed, the evidence was properly not submitted to the jury. Penn. R. R. Co. v. Hope, 2 W. N. 285, and Raydure v. Knight, 2 W. N. 713, and 3 id. 109, distinguished. Penn. R. R. v. Kerr. 12 Sm. 353, followed.

POWER AND AUTHORITY OF CASHIER—INDORSEMENT OF PAPER BY HIM—WHEN BANK BOUND—OFFICERS MAY BORROW MONEY OF THE BANK.—*Blair v. First Nat. Bk. of Mansfield.* United States Circuit Court, Northern District of Ohio. 10 Ch. L. N. 84. Opinion by WELKER, J. *Held*, 1. That a note payable to "McMann, cashier," is a note payable to the bank. 2. That McMann, as cashier, had authority to assign the note. The court states at some length the power and authority of bank cashiers. 3. That McMann being the cashier of the defendant bank, the presumption is, that the note payable to him in the form above stated was the property of the bank, and if the cashier indorsed it as such and sent it to the savings bank, in an official letter for discount, it would be the same thing as requiring the savings bank to discount it on behalf of the defendant bank; and if the savings bank discounted such note and sent the proceeds to the defendant, that was a transaction within the scope of the duties of the cashier, and for which the bank is liable, and it does not make any difference what the defendant did with the money thus received. 4. That the president, cashier or director of a National Bank may borrow money of the bank. 5. The fact that paper has not been authorized by a discounting committee to be discounted, does not in any way affect outside parties who are *bona fide* indorsees of the paper before maturity. 6. That a cashier has no authority to indorse accommodation paper, not passing through his bank in its usual line of business, so as to bind his bank to the indorsee.

SOME RECENT ENGLISH DECISIONS.

RAILWAY COMPANY — LEGISLATIVE GRANT—NUISANCE. — *Smith v. Midland Railway Co.*, High Court, Ch'y Div., 26 W. R. 10. The provisions of the Railway Clauses Consolidation Act, which authorize a railway company to construct and work their line, do not authorize them to commit acts which would, in the case of a private individual, constitute a nuisance.

MARINE INSURANCE—PARTIAL LOSS—MEASURE OF

LOSS WHEN OWNER REPAIRS — SUING AND LABORING CLAUSE.—*Lohre v. Aitchison*, High Court, Q. B. Div. 26 W. R. 42. Where an insured ship is damaged and the owner elects to repair, the measure of loss between the owner and the underwriters is the cost of repairs, less one-third new for old; and this rule holds even when it throws upon the underwriters a heavier loss than if the owner had abandoned. Where the loss, thus measured, exhausts the policy, the assured can not recover any further sum under the suing and laboring clause.

EVIDENCE — PRESUMPTION AS TO CONTENTS OF LETTER.—*Re National Fund Assurance Co.*, High Court, Chy. Div. 26 W. R. 41. S. had agreed to take shares in N. Company and place them among his friends. He did so, and never paid anything on them himself. They were registered in his name, a fact which he alleged he was not aware of till a call was made on him. He then wrote, saying he had never actually been a shareholder, and desiring to have his name removed, but took no further steps. The company was wound up, and S. made a contributory, and it was proved that a letter had been sent to S. on the day the allotments were sent round, which the secretary believed did contain a notice of the allotment of the shares to S. *Held*, that the presumption was that it did contain such a notice, and that S. could not now escape his liability.

PATENT—SPECIFICATION — IMPROVEMENT — PROTECTION OF SUBORDINATE COMBINATION—LICENSEE —ESTOPPEL — EVIDENCE — EARLIER INVENTIONS.—*Clark v. Adie*, House of Lords, 26 W. R. 45. The specification of a patent for an improvement in a machine, which consists of various subordinate combinations, must distinctly show for what particular part of the whole combination the patent is granted, otherwise only the complete machine will be protected, and not any subordinate invention. Judgment of the Lords Justices of Appeal, reported 23 W. R. 898, L. R. 10 Ch. 667, affirmed. The licensee of a patent is estopped from denying the licensor's title to the patent, the novelty or the utility of the invention, and the sufficiency of the specification; but he may show that any articles which he has manufactured were not covered by the patent, and that he had a right to manufacture them as a member of the public. He may also refer to the state of the manufacture at and before the date of the grant of the patent; and, *Semble*, that specifications of earlier patents would be admissible in evidence in proceedings between the patentee and a licensee. Judgment of the Court of Appeal, reported 24 W. R. 1007, L. R. 3 Ch. D. 134, affirmed.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY,
} Associate Justices.

INDICTMENT—FORGERY.— On indictment for forgery, an averment that the forged instrument was a note made by Absom Turner and James C. Orr, etc., for sixty dollars, sixty days after date, etc., is not sustained by proof of a note signed " Absom Turner, J. C. Orr," for $60, " with 10 per cent. interest," etc., and such a note is improperly admitted in evidence. 31 Mo. 120; 39 Mo. 592; Sherwood v. State, May Term, 1877. Opinion by NORTON, J.—*State v. Fay.*

PUBLIC ROADS—OBSTRUCTION—ABANDONMENT.— Where the public has required title to a public road, in the manner provided by the statutes, the defendant, on indictment against him, can not plead that the public had abandoned the easement by non-user, unless such non-user shall have continued twenty years. Angell on Highways, 366; State v. Young, 27 Mo. 259: 2 Wag. St, sec. 7, p. 917. Opinion by NORTON, J.—*State v. Culver.*

WRITTEN CONTRACT—EXTRA WORK—AGENCY. — Where plaintiff entered into a written contract with a city council about the macadamizing of a street, etc., and the committee elected a person to superintend the work, and notified plaintiff that his agent's business was to see that the work was done in accordance with the contract, and that the city would pay for no extra work: *held*, in a suit upon this contract, extra work done by the orders of the agent beyond the terms of the contract, either as to quantity or as to value, does not furnish a cause of action against the city. 2 Parsons Cont. 501; 13 Mo. 252; 42 Mo. 391. Opinion by NORTON, J.—*Leathers v. City of Springfield.*

INDICTMENT — CONTINUANCES— CONSTITUTIONAL LAW—SPECIAL JUDGE—DEAD WITNESS.—In a criminal case which has been long pending, an application for a continuance by defendant, on the ground of absence of witnesses, must affirmatively and clearly disclose the facts that due diligence had been used to obtain the testimony, and in such a case, " due diligence" means the *utmost degree* of diligence. The act of the legislature authorizing the members of the bar present at the time of an application for change of venue in a criminal case, to elect a " special judge " to try the same (Laws of Mo. 1877, p. 357), is authorized by sec. 29, of art. 6 of the constitution of Missouri, and is a constitutional enactment. Where a witness has once testified in any case, civil or criminal, and has subsequently died, his testimony may be proved before the jury in any subsequent trial of the same case, either by proving up his testimony, as contained in proceedings before a committing magistrate, or as contained in a former bill of exceptions filed in the same cause, or by oral proof of what he stated at the mouths of those who heard him testify, and in this state, the proof need not be made *in the very words* of the dead witness but the substance of his testimony may be proved. State v. McO'Blenis, 24 Mo. 402: U. S. v. Macomb, 5 McLean C. C. 285; Cornell v. Greene, 10 Searg. & Rawl. 14; Chess v. Chess, 17 S. & R. 409; Gildenstein v. Conway, 10 Ala. 260; Wagers v. Dickey, 17 Ohio, 439; Marshall v. Adams, 11 Ill. 37; Caton v. Lennox, 5 Rand. 36; State v. Hooker, 17 Ves. 459; Kendrick v. State, 10 Hump. 10; Sloan v. Somers, 1 Spence. (N. S.), 66; Bollinger v. Barnes, 3 Den. 460; Young v. Dearborn, 3 Fos. N. H. 372. Opinion by NORTON, J.—*The State v. Able.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

June Term, 1877.

[Filed at Mt. Vernon, Jan. 16th, 1878.]*

HON. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

EAST ST. LOUIS CITY COURT.—The City Court of East St. Louis, established under the private laws of 1865 and 1867, has ceased to exist by virtue of the constitution of 1870, and a general law approved March 20, 1874, and in force July 1st, 1874, which provides

*Ten opinions were filed at Mt. Vernon on the 16th. Only six were deemed by our reporter of sufficient interest to abstract; the remaining four deciding questions of no general interest or importance. We will supply our readers with abstracts of opinions filed at Ottawa and Springfield, as soon as possible.

for the establishment of city courts of concurrent jurisdiction with circuit courts, except as to treason and murder. These courts are as substitutes for, and not in addition to city courts previously existing. Reversed and remanded. Opinion by DICKEY, J.—*Frantz v. Fleitz et al.*

APPEAL BOND—AMOUNT.—In fixing the amount of an appeal bond, only the costs incurred up to that time are to be taken into consideration. Reversed and remanded. Per CURIAM.—*Brennan v. Academy of the Christian Brothers.*

CONTRIBUTORY NEGLIGENCE.—When a plaintiff has been guilty of negligence contributing to the injury, he can not recover unless the negligence of the defendant is gross—and not then, unless the negligence of the plaintiff is slight in comparison with that of the defendant. Reversed and remanded. Opinion by DICKEY, J.—*Ills. Cent. R. R. Co. v. Hammer.*

EFFECT OF ANTE-NUPTIAL AGREEMENT UPON "WIDOW'S AWARD."—It is not the mere execution of the papers of an ante-nuptial agreement, which provides that the woman shall receive a certain sum of money in lieu of all her claims on the estate of her husband, that cuts her off from claiming the "widow's award," etc.; but it is the payment of the sum provided for which constitutes the bar. Her right to the "widow's award" remains unaffected by the ante-nuptial agreement, until the sum provided for shall have been paid or tendered to her. She is under no obligation to take the place of an ordinary creditor, and take the hazard of the solvency of the estate, or to await the delay of its administration. Reversed and remanded. Opinion by DICKEY, J.—*Brenner v. Gauch, Exr.*

MUNICIPAL CORPORATIONS — NEGLIGENCE—DEFECTIVE BRIDGES.—It is not always the duty of a municipal corporation to make such bridges as are within its corporate limits *absolutely secure*, or to *fully protect* the public from injury. It is the duty of such corporation to exercise ordinary prudence to accomplish such results. What is ordinary prudence depends upon so many considerations, that no iron rule can be laid down upon the subject, and it should be submitted as a question of fact to the jury. If the corporation has been guilty of *gross* negligence, then the plaintiff need not show that he was entirely free from negligence contributing to the injury; but to recover in such cases, it is sufficient for him to show that his negligence was slight in comparison with that of the corporation. Reversed and remanded. Opinion by DICKEY, J.—*The Town of Grayville v. Whitaker.*

RELIGIOUS CORPORATION—TRUSTS.—The trustees of a religious corporation, in the absence of a declared or clearly implied trust, hold the property for the use of the particular society or congregation of which they are officers, and not for any church in general, or for the benefit of any peculiar doctrines or tenets of faith and practice in religious matters. The property belongs to the society or congregation so long as the corporation exists, and when it ceases to exist the property belongs to the donors or their heirs. The society or congregation appoints the trustees, and may remove them and fill vacancies. It may adopt such rules and regulations in the management of its estate as the members may deem proper. In these respects it is not subject to the supervision or control of any ecclesiastical authority whatever, the only restriction imposed being that its rules and regulations shall not be inconsistent with the constitution and laws of this state or of the United States. Affirmed. Opinion by SCHOLFIELD, C. J.—*Calkins et. al. v. Cheney et al.*

A Chinaman has been admitted to the English bar in Hong Kong.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS, } Associate Justices.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—The written answer of a bank, verified by the oath of its president, is not competent evidence, in a proceeding supplementary to execution, to show that the bank has funds of the defendant on deposit. The defendant has a right and must be given an opportunity to cross-examine the president of the bank. Opinion by HOWK, J.—*O'Brien v. Flanders.*

BREACH OF PROMISE OF MARRIAGE.—There is no reason why an action may not be maintained for the breach of a marriage contract, in our court, according to the principles of the common-law. Besides, the statute has recognized the right to bring such action by giving the circuit court jurisdiction thereof. A promise to marry need not be in writing. The statute of frauds applies to promises in consideration of marriage; not to promises to marry. Opinion by WORDEN, J.—*Short v. Stotts.*

LIEN OF MORTGAGE ON PROPERTY REDEEMED FROM SALE.—When a sale is had on a foreclosure of a mortgage, and the property sells for less than the judgment, and, afterwards the property is redeemed by the mortgagor, the mortgagee is not bound to take his execution against other property, but may have a second sale of the same property. The redemption of the property left the title in the mortgagor subject to the lien of the mortgage for the balance unpaid, and the right of sale must be co-extensive with the lien, unless there is some circumstance which would authorize a court to control it. Opinion by PERKINS, J.—*Canthorn v. I. & V. R. R. Co.*

PARTNERSHIP—EFFECT OF DISSOLUTION.—Plaintiff gave defendants the exclusive sale, for five years, of the works manufactured by plaintiff. Defendants claimed damages for a breach of this agreement. Answer by plaintiff that the firm had ceased to exist, and thereby had abandoned the contract. *Held*, that an abandonment of the contract was not the necessary legal effect of a simple cessation of the partnership. The contract was a continuing one, and there could be no cessation of the partnership as to it. All the parties to the contract were bound to see it executed whether they remained partners in other business or not, and, so long as the contract was observed by them, there was no abandonment of it. The demurrer should have been sustained. Opinion by PERKINS, J.—*Dickson v. Indianapolis Mfg. Co.*

ABSTRACT OF DECISIONS OF THE COURT OF APPEALS OF KENTUCKY.

[To appear in 13th Bush.]

HON. WM. LINDSAY, Chief Justice.
" W. S. PRYOR,
" M. H. COFER,
" J. M. ELLIOTT, } Associate Justices.

PROMISSORY NOTES—STATUTE OF LIMITATIONS—PROOF OF PAYMENT — ALTERATION — EVIDENCE—MEMORANDUM.—1. An indorsement of a partial payment on the back of a note, when the fact of the payment is controverted by the payor or his personal representative, is not evidence sufficient to suspend the running of the statute of limitations. 2. The burden of proving that the payment indorsed on the note was actually made, and at the time it purports to have been

made in the indorsement, when the alleged payment is controverted, is upon the holder of the note, in a case where he claims that the running of the statute of limitations was suspended by the alleged payment. 3. All alterations, erasures or mutilations of paper upon which a liability is sought to be established against those who were originally bound, must be explained by the holder, when the fact of mutilation, erasures or alteration is raised in the pleading and established by the proof. 4. A mere memorandum made by a party on a note, or obligation, in his possession, can not, when the fact it purports to establish is denied, be admitted as testimony sufficient to create or continue the liability. Opinion by PRYOR, J. Affirmed.—*Frazer's adm'r v. Frazer.*

WHEN COMPENSATION SHOULD NOT BE ALLOWED FOR IMPROVEMENTS MADE BY A PARTY IN POSSESSION.—1. When a party obtained the title and possession of land, by fraudulent representations, he should be treated as having entered, with full knowledge that his entry was without right, should be charged with rents, and should not be allowed for ameliorations or improvements made by him, 2. Miller exchanged a tract of land, situated in Missouri, with Mosely for land in Kentucky, the latter never having seen the land in Missouri, and relying upon the representations of Miller as to its quality and value. Mosely removed from Kentucky to Missouri to settle upon the land obtained in the exchange, and ascertained on his arrival there that the land was almost worthless, and that an unconscionable advantage had been taken of him by fraudulent representations, in regard to its quality and value. On a recission at the suit of Mosely, Miller is charged with rents, and is not allowed anything for meliorations and permanent improvements made by him. Opinion by PRYOR. J. Reversed.—*Miller v. Mosely.*

POWER OF EQUITY TO ORDER SALE OF CHATTELS OWNED IN COMMON.—1. A lease for years is not real but personal estate. Sec. 13, ch. 21, General Statutes. 2. There is no statute authorizing the courts to sell chattels, because they are indivisible between the owners, but in courts of equity such power is inherent and independent of statute, 3. When the chancellor undertakes to supply a remedy, because the law has given none, he should give one commensurate with the exigencies of the case. 4. When the chancellor finds a party with a legal right, but without a remedy to enforce it, he should furnish an adequate remedy. 5. Indivisible chattels, real or personal, may be sold and the proceeds divided among those entitled. When a chattel, whether real or personal, is owned by tenants in common, and is indivisible in kind, the chancellor may, on the petition of a part of the owners against the others, decree a sale and division of the proceeds. The sale of a chattel real, in this case, is affirmed. Opinion by COFER, J.—*Prather v. Davis.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.—*Filed December* 19, 1877.

HON. LUTHER DAY, Chief Justice.
" JOSIAH SCOTT, }
" D. T. WRIGHT, }
" W. W. JOHNSON, } Justices.
" T. Q. ASHBURN, }

DEVISE—POWER OF SALE—PARTITION.—A testator, whose estate consisted of a single tract of land occupied as a homestead, and some personal property, devised and bequeathed to his wife one-half of all his real and personal estate, and the other half to his brothers and sisters, and the children of a deceased sister, naming each, and specifying the proportion or share of each. He appointed an executor, and authorized and empowered him to sell and convey "all said real estate to the purchaser or purchasers thereof, if necessary for the purpose of distributing" it "among the devisees and legatees aforesaid." *Held*, 1. That this was a devise in fee, to each of the devisees by name, of an undivided estate in land, in the proportions specified, and not a bequest of the proceeds of said land. 2. That the power of sale vested in the executor was a naked power only, not a power coupled with an interest in the land, and could only be exercised, if necessary, for the purpose of making distribution among the devisees. 3. Each of said devisees holds his share as a tenant in common with the others, and is entitled to all the rights of such tenancy, subject only to the power of sale. 4. The power of sale was not absolute. It could only be exercised, if necessary, for the purposes of distributing the estate. Its exercise must be limited to the purposes for which it was granted. 5. A devisee may sell and convey his undivided share as real estate before distribution, but the purchaser takes the same, subject to this power of sale, the same as his grantor, if its exercise becomes necessary. 6. The devisees or their grantees, have each the right to hold his share in severalty, if the same can be set-off without manifest injury to the others; but if distribution can not be made in land, and it becomes necessary to sell to make a proper division, then the executor is authorized to sell the whole, notwithstanding a prior conveyance of an undivided interest by one of the devisees. 7. By proceedings in partition the widow had her half assigned to her in land. *Held*, that the power of sale was not thereby defeated as to the other half, if the necessity existed for a sale, to make distribution among the other devisees. 8. The defendant acquired title to an undivided share by purchase of a devisee, the plaintiffs afterwards purchased and received a deed for the whole, including defendant's share, from the executor. The plaintiffs can not maintain their title to the share of defendant, unless the necessity existed for a sale of the whole, and a court of equity will not enjoin proceedings in partition to have such share set-off in land, unless it appears that such share can not be set-off without manifest injury to the interests of his co-tenants. Opinion by JOHNSON, J.; DAY, C. J., and SCOTT, J., dissenting.—*Hoyt v. Day.*

BOOK NOTICE.

AMERICAN CRIMINAL REPORTS. A series designed to contain the latest and most important criminal cases determined in the Federal and State Courts in the United States, as well as selected cases important to American lawyers from the English, Irish, Scotch and Canadian Law Reports, with notes and references. By JOHN G. HAWLEY, late prosecuting attorney at Detroit. Vol. I. Chicago: Callaghan & Co. 1878.

The series of contemporary leading cases on criminal law, interrupted by the death of Mr. Green, has been resumed by Mr. Hawley. The present volume contains 720 pages, with a good index, and the table of cases shows that over 175 cases are reported within its covers. They are selected with care, many of them being fully annotated, and arranged according to subjects, instead of chronologically, or according to states. The present volume must certainly be a *sine qua non* to the criminal practitioner, and, from the great number of convictions reversed on account of errors, we would recommend it to every *nisi prius* judge who is called upon to preside over criminal trials. The volume is printed on good paper, and is well bound.

Reg. v. Prince, 2 Cr. Cas., Res. 154, the first case in the volume, is one which, at the time of its decision, provoked considerable discussion. The prisoner was convicted of taking an unmarried female, under the age of fourteen, out of the possession, and against the will of her father.

The conviction was had under a statute making such a taking punishable by fine and imprisonment. It was admitted that the prisoner did take the girl; that she was under sixteen, and that he *bona fide* believed, and had reasonable ground for believing, that she was over sixteen. The jury found that she looked much above that age, and that she told the prisoner that she was so. It was held, however, by the court of criminal appeal, that this afforded no defense, and that the prisoner was rightfully convicted. Fifteen judges, among them the Chief Justice of the Queen's Bench and the Chief Baron of the Exchequer, sustained this ruling, while one (Brett, J.) dissented. Among the American cases on this subject here reported, are *Osborn v. The State*, 52 Ind. 526, where it was held that a statute against abduction "for the purpose of prostitution" would not sustain an abduction for the purpose of sexual intercourse; and *Lyons v. The State*, *Ib.* 52, where the court held that a statute against the abduction of females "of previous chaste character" meant of actual personal virtue in distinction from good reputation, and that the defendant might show in bar of the prosecution a single illicit connection on the part of the woman.

State v. Williams, 75 N. C., is a novel case. The defendants were indicted for assault and battery, in having tied a rope around the prosecutrix's body, and suspended her from a wall. It appeared that the parties were members of a society called "Good Samaritans," and that this was part of the ceremony of expulsion. The court held that the defendants were liable. There is something like a touch of irony in the opinion of Bynum, J.: "If the act of tying this woman would have been a battery, had the parties concerned not been members of the society of 'Good Samaritans,' it is not the less a battery because they were all members of that *humane institution*." In *Com. v. Collberg*, 119 Mass. 351, it was held no defense to a charge of assault and battery that the defendant and prosecutor fought by mutual agreement, in the presence of from fifty to one hundred persons, until one of them declared himself satisfied, and that the injuries received by the prosecutor were given in such fight; the court citing Matthew v. Ollerton, Comb. 218; Boulter v. Clark, Bull (N. P.) 16; Stout v. Wren, 1 Hawks, (N. C.) 420; Bell v. Hansley, 3 Jones (N. C.) 131; Adams v. Waggoner, 33 Ind. 531; Logan v. Austin, 1 Stew, (Ala.) 476; Regina v. Lewis, 1 C. & K. 419; Rex v. Perkins, 4 C. & P. Chapman v. State, 14 Ohio St. 437, and State v. Beck, 1 Hill (S. C.) 363, are, however, authorities to the contrary.

It appears, from *Delaney v. State*, 41 Tex. 601, that a prisoner who burns a hole in his cell, in order to make his escape, is not guilty of arson though, it seems, that if he intended to escape in the confusion attendent on the burning, he would be. The case of *People v. Wilson*, 64 Ill. 195, covers nearly fifty pages. Here, the proprietor and editor of a Chicago newspaper, were brought up and fined for contempt of the Supreme Court. The opinion of the judges and the editor's note to this case contain an exhaustive review of the question of constructive contempt. In *Waterman v. People*, 67 Ill. 91, a letter of introduction directed "to any railroad superintendent," bespeaking courtesies toward the bearer, was held not a subject of forgery. *State v. Henderson*, 47 Ind., holds that betting upon the result of an election is not gaming; an election not being a game. Two cases, *Doehring v. State*, 49 Ind. 56 (a policeman's club), and Berry v. Com. 10 Bush (Ky.), 273, (a knife), hold that what is or is not a dangerous weapon is a question of fact and not of law.

Among the decisions on questions of criminal procedure is the case of *State v. Madigan*, 48 Ind. 416, where the court holds that the power of entering a *nolle prosequi* belongs to the circuit attorney and not to the court. The reporter's note to this case is peculiarly happy. He cites but one authority—a story told of Lord Chief Justice Holt. The Chief Justice having committed one of a brotherhood of swindlers, who called themselves prophets, named John Atkins, to take his trial for seditious language, another of them named Lacy called at the Chief Justice's house, in Bedford Row, and desired to see him. *Servant*—"My Lord is unwell to-day, and can not see company." *Lacy*—(In a solemn tone.) "Acquaint your master that I must see him, for I bring a message to him from the Lord God." The Chief Justice having ordered Lacy in and demanded his business, was thus addressed: "I come to you a prophet from the Lord God, who has sent me to thee and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou has sent to prison." *Holt, C. J.*—"Thou art a false prophet and a lying knave. If the Lord God had sent thee, it would have been to the attorney-general; for he knows that it belongeth not to the Chief Justice to grant a *nolle prosequi;* but I, as Chief Justice can grant a warrant to commit thee to bear him company." This was immediately done, and both prophets were convicted and punished.

State v. Smith, 75 N. C. 580, may serve as a check upon the invectives of prosecuting attorneys, for here the judgment was reversed on account of two passages in the prosecuting attorney's speech, viz.: "The defendant was such a scoundrel that he was compelled to move his trial from one county to a county where he was not known;" and; "The bold and brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me if I did, he would get the legislature to impeach me." "The court," it is said, "is the prisoner's constituted shield against all vituperation and abuse," which, if true, is a fact which many judges either have never known or have entirely forgotten. In Indiana, however, this safeguard would seem to be carried rather too far. In *Ferguson v. State*, 49 Ind. 33, a murder case, it was adjudged error, for which the verdict should be set aside, for the court to allow counsel for the prosecution, in addressing the jury, to comment on the frequency of that crime in the community, ascribing it to the lax administration of the law, and to urge them to make an example of the prisoner.

How opposite is this tender regard for the prisoner to the conduct of the old English judges in criminal trials. Take, for example, the trial of Sir Walter Raleigh, an account of which the editor has appended to the report of this last case. Chief Justice Popham had decided that, although the charge was high treason, it was sufficiently supported by the uncorroborated evidence of a single witness; that there was no occasion for the witness to be produced in court or sworn, and that a written confession by him accusing himself and implicating the prisoner was enough to satisfy all the requirements of the common and statute law upon the subject. Raleigh urged that Lord Cobham, his sole accuser, should be confronted with him. *Popham, C. J.*—"This thing can not be granted, for then a number of treasons should flourish." *Raleigh*—"The common trial in England is by jury and witnesses." *Popham, C. J.*—"If three conspire a treason, and they all confess it, here is never a witness, and yet they are condemned." *Raleigh*—"I know not how to conceive the law." *Popham, C. J.*—"Nay, we do not conceive the law, but we know the law." The prosecuting attorney, Lord Coke, was even more vehement. While he was detailing the charge to the jury, which he knew he could not establish, he was interrupted by the prisoner. *Raleigh*—"You tell me news I never heard of." *Coke, Attorney-General*—"Oh, Sir, do I? I will prove you the notoriest traitor that ever held up his head at the bar of any court." *Raleigh*—"Your words can not condemn me; my inno-

cency is my defense. Prove one of these things where with you have charged me, and I will confess the whole instrument, and that I am the horriblest traitor that ever lived, and worthy to be crucified with a thousand thousand torments." *Coke*—"Nay, I would prove all; thou art a monster; thou hast an English face but a Spanish heart." *Raleigh*—"Let me answer for myself." *Coke*—"Thou shalt not." *Raleigh*—"It concerneth my life." *Coke*—"Oh, do I touch you!" The attorney-general's invective and abuse became at length too much for even the Bench, and one of the commissioners, the Earl of Salisbury, rebuked him, saying: "Be not so impatient, good Mr. Attorney, give him leave to speak." Coke, then, the reporter relates, sat down in a chafe, and would speak no more until the commissioners had entreated him. After much ado he went on, and made a long repetition of all the evidence, again addressing the prisoner: "Thou art the most vile and execrable traitor that ever lived. I want words to express thy viperous treason."

Perhaps the most remarkable cases in this volume are *State v. Biddle*, 54 N. H. 379, and *State v. Neely*, 74 N. C. 425, the first on account of the amount of learning and research which is brought to the settlement or non-settlement of a fact of every day observation; the second, as showing how sectional prejudice may warp the evenness of a judicial opinion. Want of space prevents us from quoting from the learned opinion in the first case. It might be read with profit and interest by the historian, the naturalist, the novel-reader, and even the distiller, who may all find here not only an entertaining sketch of the kind and nature of intoxicating liquors, but its use and abuse in every nation under the sun; its mode of manufacture and its effect not only upon men, but upon monkeys. The opinion in the second case we would fain perpetuate, as we believe it will continue to afford amusement to the profession as long as the reports of North Carolina remain extant. The prisoner was indicted for assault with intent to commit rape. The prosecutrix, a white woman, having parted from a companion, started to go home alone through the woods. She heard the prisoner—a negro—call out to her to stop, and saw him running after her about seventy yards distant. She ran, and was pursued by the negro about a quarter of a mile, when, coming near a dwelling-house, he turned back and ran off, not having during the chase caught up with her. A majority of the court affirmed the conviction. The opinion of the Chief Justice is certainly unique: "I see a chicken-cock drop his wings and take after a hen; my experience and observation assure me that his purpose is sexual intercourse; no other evidence is needed. Whether the cock supposes that the hen is running by female instinct, to increase the estimate of her favor and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt; as, for instance, if she is a setting hen and makes fight, not merely amorous resistance. There may be evidence from experience and observation of the nature of the animals, and of male and female instincts, fit to be left to the jury upon all of the circumstances and surroundings of the case. Was the pursuit made with the expectation that he would be gratified, voluntarily, or was it made with the intent to have his will against her will and force? Upon this case of the cock and the hen, can any one seriously insist that a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female instincts. Again: I see a dog in hot pursuit of a rabbit; my experience and observation assure me that the intent of the dog is to kill the rabbit; no doubt about that, and yet, according to the argument of the prisoner's counsel, there is no evidence of intent. * * * The prisoner had some intent when he pursued the woman. There is no evidence tending to show that his intent was to kill her or rob her, so that the intent must have been to have sexual intercourse, and the jury, *considering that he was a negro*," (Is the presumption of virtue in the Caucasian a *presumptio juris et de jure*?) "and considering the hasty flight of the woman, and the prisoner stopping and running into the woods when he got in sight of the house, and the instinct of nature, as between male and female, and the repugnance of a white woman to the embraces of a negro, had some evidence to find that the intent was to commit a rape." It is a matter of some satisfaction that two of the judges, Rodman and Bynum, J. J., were unable to concur in either the reasoning or conclusions of the Chief Justice.

NOTES.

In England, eminence at the bar is the path to the bench. The system has much in its favor, but there is this drawback to it, that the admirable advocate sometimes proves by no means an admirable judge, chiefly because he can not put aside the peculiar sort of ability which has made him what he is. This seems to have been the trouble with Mr. Justice Hawkins, in the Penge case, which he lately tried in London. The whilom famous counsel against the Tichborne claimant, no doubt, felt an itching to be once more examining and cross-examining, and couldn't hide the advocate under his ermine. It is roundly charged against him, that he behaved like a prosecuting counsel, and there is, no doubt, a degree of truth in the allegation.

A SUBSCRIBER sends us the following, which he received from a justice of the peace in an adjoining state. It is written on a postal card, and addressed to Mr. Judge W——: "Sir, i wont to ask you a question in regard to a sivel cais before a Square Can a justes ishue a summens on a Defendent that lives out of the ton Ship where the justes office is so he lives in the saim County i would like to have your advice i have looked the law over and find nothing to hinder but it is the genrel supsetion that a justes can have no jurisdic out of his T. P. to convene a, action i have had to aplication and decline pleas oblige if prudent yours

adress to —— J. P."

A BILL has been introduced into the New Jersey Legislature entitled "An act to reduce the public expense of the courts of the County of Passaic, by requiring parties in civil causes to pay for the juries in such cases." It is based on the theory that the public should not be made to pay the cost of civil actions, and it is quite a legal novelty in its way. If passed, it will mark a decidedly "new departure" in the history of civil jurisprudence. The bill provides that: "In all actions brought in the Supreme Court or in the Circuit Court of the County of Passaic, and tried in said county, either party may demand a trial by jury, and the party so demanding a trial by jury shall be required to pay in advance, or secure to be paid to the sheriff of said county, the fees of the jurors, at the rate per diem fixed by law, for the number of days or parts of days said jurors shall be entitled to receive compensation for attendance on the courts in the hearing of said cause; and the cost of such jury, paid for, or secured to be paid as aforesaid, shall be taxed by the clerk of the court as other costs are taxed, and shall be recoverable, if judgment shall be given in favor of the party demanding the jury."